



**Mohamed & 5 others v Masinde Muliro University of Science and Technology  
& 5 others; Mount Kenya University (Interested Party) (Environment and  
Land Case 48 of 2019) [2023] KEELC 17085 (KLR) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17085 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT AND LAND CASE 48 OF 2019**

**FO NYAGAKA, J**

**MAY 3, 2023**

**BETWEEN**

**MUDE HUSEIN MOHAMED ..... 1<sup>ST</sup> PLAINTIFF  
RODGERS SAMANYA ..... 2<sup>ND</sup> PLAINTIFF  
HASSAN ABDULAHI ALI ..... 3<sup>RD</sup> PLAINTIFF  
JAMES NJENGA NYAGA ..... 4<sup>TH</sup> PLAINTIFF  
ABDULRAHMAN WAMALA ..... 5<sup>TH</sup> PLAINTIFF  
THE PUBLICAN (AFRICA) LTD ..... 6<sup>TH</sup> PLAINTIFF**

**AND**

**MASINDE MULIRO UNIVERSITY OF SCIENCE AND  
TECHNOLOGY ..... 1<sup>ST</sup> DEFENDANT  
TURKANA UNIVERSITY COLLEGE (BEING SUED AS A CONSTITUENT  
COLLEGE OF THE 1ST DEFENDANT) ..... 2<sup>ND</sup> DEFENDANT  
THE COUNTY GOVERNMENT OF TURKANA ..... 3<sup>RD</sup> DEFENDANT  
THE COMMISSIONER OF LAND ..... 4<sup>TH</sup> DEFENDANT  
THE COUNTY SURVEYOR TURKANA COUNTY ..... 5<sup>TH</sup> DEFENDANT  
THE HON. ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT**

**AND**

**MOUNT KENYA UNIVERSITY ..... INTERESTED PARTY**



## RULING

1. The Notice of Motion before me that is dated 10/05/2022 and filed on 12/05/2022 was brought by the Plaintiffs. It was anchored on Sections 13(1) and 19(1), (2) and (3) of the *Environment and Land Court Act*, 2012, and all enabling provisions of the law. It sought the following orders:
  1. That this Honourable Court do issue an order directing the Directorate of Criminal Investigations, Turkana County office to file in Court and produce in Court as evidence their investigations report in respect of parcels of land Plot No. 931, 932, 829,976, 790, 920 and 888 situated within Lodwar Town;
  2. That the parties in the suit be at liberty to cross-examine the maker(s) of the Investigation Report filed in Court under paragraph 1 above at the hearing of the suit.
  3. Any such directions as are just and fair for the quick disposal of the suit.
2. The Application was based on the grounds that the Plaintiffs had lodged a complaint with the Director of Criminal Investigations (DCI) against the 1<sup>st</sup> Defendant over the ownership of plot numbers 931, 932, 829,976, 790, 920 and 888 situate in Lodwar Town; they furnished the DCI with the pleadings herein; some of the Plaintiffs were interviewed by the DCI with a view to preparing a report over the ownership of the land; the DCI had advised that he was not obligated to give the report to the Plaintiffs or any other persons apart from the Director of the Public Prosecutions (ODPP) unless ordered by the Court; it is only fair and just to have an order directing the said office to give the parties herein and the court the report so as to assist in resolving the issues involved; the DCI is endowed with resources and skill to carry out their work and assist the Court with reports; that the Court has the power to call for the investigation report and any other evidence to assist in the resolution of the dispute and the Plaintiffs have approached the Court with haste.
3. It was supported by the Affidavit of Rodgers Samanya sworn on 10/05/2022 and filed with the Application and a supplementary one sworn on 16/11/2022. Apart from repeating the contents of the grounds the application was based on, the supporting affidavit had the following information. It had attached to it and marked RS1 and RS2 copies of the letter of complaint to the DCI and the County DCI respectively. He deponed further that by the 10/05/2022 when the affidavit was sworn the investigations by the DCI were underway.
4. The Applicants filed a Supplementary Affidavit on 17/11/2022. In it he deponed that he and the other Plaintiffs made a complaint to the Lodwar Police Station on 15/02/2021 when the 1<sup>st</sup> Defendant allegedly demolished the fences to their plots while claiming that they belonged to it. He annexed and marked as RS1 a copy of the Occurrence Book (OB) number report. Subsequent to that they made another report to the Lodwar DCI offices whereas their respective statements were recorded over their ownership of the plots. He deponed further that following the complaint, he was informed by their Advocates that a report dated 10/10/2022 had been forwarded to their learned counsel's office on 27/10/2022 and he was of the view that the same would assist the Court in making a just decision. He annexed the Report to the Affidavit and marked it as RS2. He swore further that in view of the report, a witness from the office of the DCI was a necessary one to assist the Court in the production of the Report of the investigation.
5. The Application was opposed through a Replying Affidavit sworn by one Professor George Chemining'wa who stated that he was the Principal of the 2<sup>nd</sup> Defendant which was a Constituent



- College of the 1<sup>st</sup> Defendant. He denied authority of the 2<sup>nd</sup> Defendant to swear the Affidavit on his behalf and that of the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Plaintiffs and alleged that the said party lacked locus standi to swear the affidavit on their behalf and it be struck out for incompetency.
6. He deponed that the 1<sup>st</sup> Defendant was the sole proprietor of the land parcel No. IRN 6477 LR 14691/425 Kanamkemer, measuring 42.02 Ha, which had clear demarcations to it. He deponed that the 2<sup>nd</sup> Defendant was in occupation. His oath was that the Plaintiffs did not have title to any part thereof and on 31/05/2019 the 1<sup>st</sup> Defendant issued notices to them to stop encroaching the suit land. That the Plaintiffs without any colour of right encroached onto the land but they had never been in occupation of it. That the Plaintiffs had attempted to interfere with the fence thereon and trespass. That the Interested Party was at all material times the registered owner of the land hence it would not be there for allocation to the Plaintiffs.
  7. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants had never been privy to any negotiations to surrender the suit land to the Plaintiffs. At the time the 1<sup>st</sup> Defendant bought the land from the Interested Party there was no indication on the register that the Plaintiffs had interest on it. At no time did the 1<sup>st</sup> Defendant move onto the suit land and demolish any fences thereon yet the Plaintiffs have never been in occupation thereof.
  8. He deponed that the application was premature as the Applicants had not exhausted the available dispute resolution mechanisms before moving the Court. He discounted the deposition by the plaintiffs that they had been informed that the investigations over the matter were underway and that the report could not be forwarded to them. He swore that the DCI could not avail a report which was not yet complete or not within its disposal. He repeated the deposition that the Applicants had not exhausted the Doctrine of Exhaustion. He deponed that the Applicants had not sought the assistance of the Inspector General of Police as provided for under Section 8 of the [National Police Service Act](#). He deponed that the applicants should have given their grievance to the office of the Inspector General of Police to deal with it. Moreover, he deponed that the DCI was under no obligation to release the report to anyone as it would invade privacy and impede the due process of law and prejudice the commercial interests of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
  9. The deponent swore that the Application was in contravention of Section 6 of the [Access to Information Act](#), 2016, which he quoted verbatim and in extensu. He prayed for the dismissal of the application.
  10. On their part the 3<sup>rd</sup> and 5<sup>th</sup> Defendants replied to the Application through its learned counsel, one Lele Ikapolon. It was sworn on 27/06/2022 and filed on 27/06/2022. He too deponed that the deponent of the supporting affidavit lacked *locus standi* to swear the affidavit on his own behalf and that of the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Plaintiffs. He deponed that the same be struck out for incompetence. He denied the allegation that the two Defendants had any interest in the suit land hence unaware of the alleged demolition of fences by the 1<sup>st</sup> Defendant. He deponed that the mandate of the 3<sup>rd</sup> Defendant was to allocate land while for the 5<sup>th</sup> its was to survey the parcels of land within its jurisdiction.
  11. In his deposition he castigated the lodging of the complaint by the Plaintiffs to the DCI before all mechanisms were exhausted. He deponed that there was no express evidence by the DCI that investigations were underway or that the Report could not be given by the said office hence the application was a waste of the time of court. He too deponed that the matter should have been reported first to the Inspector General. He stated that the DCI was not bound to produce the report and if it would cause injustice and impede due process of law.
  12. The 4<sup>th</sup> to 6<sup>th</sup> Defendants did not oppose the application. The Interested Party did not oppose it either. Although the 3<sup>rd</sup> Defendants learned counsel indicated on 5/15/2022 that he was seeking instructions



on whether or not to oppose the application, by the time the Court gave the ruling herein it has neither responded to the application nor indicated their position on the same.

### Submissions

13. The application was disposed of by way of written submissions. The Court received the submissions by the Applicants and those of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
14. The Plaintiffs/Applicants summarized first the contents of the application and the prayers it sought. They also gave the background of the application. I need not repeat the same since it is already captured in the preceding paragraphs.
15. They summarized the facts of the application as given above, which too I am not rehashing it herein. They argued that the basis for the report made to the DCI was the unlawful demolition of the Plaintiff's structures and fences on the suit parcels of land of which they had reported to the Police and given an OB report confirming a complaint on the destruction of property. He repeated the replies by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in opposing the application. They repeated the contents of the Plaintiff's Supplementary Affidavit. They argued that it was crucial that the report be availed, produced and the maker be cross-examined. They refuted the argument that the Report infringed the Provisions of Section 6 of the [Access to Information Act](#), 2016. They relied on Section 19(1) of the [Environment and Land Court Act](#) 2016. Their submission was that the suit had not been heard hence no prejudice will be suffered by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants.
16. They submitted that the Report dated 10/10/2022 be filed with the Court and the evidence contained therein be subjected to the necessary scrutiny. Their argument was that the contention by the other parties that investigation Report was not available was overtaken by events since it was already out and given. [M.L. Setbi v R.P Kapur](#), 1972 AIR 2379, 1973 SCR9 (1) 697 and also the case of [Francis Kariuki Thuku v Kenya Ports Authority & Another](#)(2021) eKLR.  
They supported their application with the case of [Lustman & Company \[1990\] Ltd v. Corporate Business Centre Ltd & 4 Others](#) (2022) kehc42 (KLR), on discovery of documents. That was also considered in the case of

### 1st & 2nd Defendants' Sumissions

17. First, they summarized the application, and I will not repeat the summaries. They raised four issues, namely:
  - a. Whether the 2<sup>nd</sup> Plaintiff Applicant has locus standi to swear the affidavit supporting the application on behalf of the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Plaintiff Applicants without express authority filed in court.
  - b. Whether the Plaintiff Applicants satisfied the Doctrine of Exhaustion and whether the application is premature.
  - c. Whether the court should order the Directorate of Criminal Investigations, Turkana County Office to produce their investigation report in respect of parcels of land Plot Nos. 931,932,829,976,790,920 and 888.
  - d. Whether production of the report impedes the due process of law and the right to privacy.
18. On whether the 2<sup>nd</sup> plaintiff applicant had locus standi to swear the affidavit supporting the application on behalf of the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> plaintiffs/applicants without express authority filed in court, they submitted that his affidavit offended Order 1 rule 13 (1) & (2) of the [Civil Procedure Rules 2010](#), which



they quoted verbatim. They submitted that consent or authority was not given to the 2<sup>nd</sup> Defendant prior to swearing the supporting affidavit annexed to the Application dated 10/5/2022 and on the supplementary affidavit sworn on 16/11/2022. They relied on the case of *Abdulla Absbir & 38 Others v. Yasmin Farah Mohamed* [2015] eKLR, H.C at Nairobi (Milimani) Civil Suit No. 165 of 2015 where the learned judge, Mabeya J. stated as follows:

“From the foregoing, it is quite clear that a party in a proceeding cannot purport to appear, plead and act on behalf of others until and unless he is so authorized to do so in writing and the authority is filed in such a proceeding. To my mind therefore, a statement in an affidavit that one has the authority of the co-plaintiffs or co-defendants is not enough. Such an authority, properly signed by the party giving the authority, must be filed in the proceeding.”

19. They submitted that the suit was not a representative and relied on the cases of *Hezekia Kipkorir Maritim & 10 Others v Philip Kipkoech Tenai & 2 others* [2016] eKLR and *Andrew Ireri Njeru - Embu Nyangi Ndiiri Proposed Society Chairman & Others v Daniel Nganga Kangi & another* [2015] eKLR, H.C. at Embu Civil Case No. 4 of 2013.
20. On whether the plaintiff applicants satisfied the doctrine of exhaustion and whether the application is premature, they relied on the 5-Judge Bench decision of Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 (2020) eKLR which dealt with the same issue extensively, and while citing Section 8 of the *National Police Service Act* they summed it that litigants should pursue available remedies before proceeding to judicial means where such remedies are available.
21. Then they stated that the Application was premature and applied the reasoning of the Court in the *Rosemary O'bryen Hoarse Russell (Suing on Capacity as Administrator of the Estate of Nicholas James Russell) v Hassan Kassimu Choro & 5 Others* [2021] eKLR.
22. Regarding the report by the DCI marked as annexure RS2 they submitted that it was sought to be prematurely produced since in its body it read that “A detailed report of the investigations shall be available once the investigations are finalized”.
23. On whether the court should order the Directorate of Criminal Investigations, Turkana County office to produce their investigation report in respect of parcels of land plot Nos. 931,932,829,976,790,920 and 888, they still submitted that the Court ought not do so. They relied on the Rosemary O'bryen (supra). They were of the view that the Applicants were on a wild goose chase designed to fish for evidence yet the Applicants could ask for summons to the Directorate of Criminal Investigations, Turkana Office, and cross-examining them on whatever seems relevant to them. Further, they relied on the Court of Appeal decision in *Peter Kirika Gitbaiga & another v Betty Rasbid* [2016] eKLR. On the issue that submitted that the Applicants were asking the court to descend into the arena of conflict. Lastly, they submitted that the Court cannot compel the DCI to produce a report already surrendered to the applicants.
24. On whether the production of the report impedes the due process of law and the right to privacy they relied on Section 6 of the *Access to Information Act* 2016 which they opined that it put a Limitation of the right of access to information by prohibiting access to information which would impede the due process of law. They submitted that the Court should not interfere with the due process of law of other institutions unjustifiably, and that is what the applicants sought to achieve.



## Issues, Analysis And Determination

25. I have considered the application, the facts thereof, the law, the submissions by learned counsel and the authorities the parties relied on. I am of the view that four issues lie before me for determination. These are:
- a. Whether the 2<sup>nd</sup> Defendant has locus standi to swear the Supporting Affidavit on his behalf and that of the other Defendants
  - b. Whether the Applicants failed to satisfy the Doctrine of Exhaustion and the Application premature
  - c. Whether the application is merited
  - d. Who to bear the costs of the application
    1. This Court decided to analyze the application herein based on the issues stated above which it will handle sequentially and in simple straight determinations. Thus, it will not pre-occupy itself with whether the provisions cited were relevant or not, given that it has considered them and is of the view that by virtue of Article 159(2)(d) of the Constitution the failure to cite the relevant provisions can be overlooked. I now turn to the substance of the Application.

### **a. Whether the 2<sup>nd</sup> Defendant has locus standi to swear the Supporting Affidavit on his behalf and that of the other Defendants**

27. The Respondents who opposed the application made much hype about the failure of the 2<sup>nd</sup> Defendant to obtain prior written authority to swear both the Supporting Affidavit and the Supplementary one on behalf of the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Plaintiffs. They contended that failure by the said Rodgers Samanya to receive written authority to swear an Affidavit or Affidavits in that behalf was contrary to Order 1 Rule 13(1) and (2) of the Civil Procedure Rules and therefore the Affidavits he swore were incompetent and be struck out. What the parties raising this issue did not tell the Court in their submissions is that the implication of that is that once the Affidavits were struck out, all the facts deponed thereto would cease to exist on the record and ultimately the Application would be unsupported factually hence incompetent and a candidate for striking out.
28. I have given due thought over the provision alleged to have been contravened by the deponent of the two affidavits in issue. I agree in totality as to the content and import of the law about filing of authority obtained prior to the filing of any affidavits by one on behalf of parties who are many. I therefore agree also with the authorities cited.
29. In the instant application, the deponent had the prior written authority while the rival parties think otherwise. This Court has looked at the record right from the time the suit was brought to the time when the application was urged. It finds that on or about 26/06/2019 the 3<sup>rd</sup> to 6<sup>th</sup> Defendants gave written authority to both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to sign all pleadings in respect of the suit. The document titled “Letter of Authority to Act” was filed together with the Plaint and the application that accompanied it on the 27/06/2019. Thus, in so far as there was prior written consent to plead filed as such, the provisions of the law were complied with hence the said deponent has locus standi to swear the two affidavits. It is therefore neither here nor there for the rival parties to argue about the suit being representative or otherwise.



**b. Whether the Applicants failed to satisfy the Doctrine of Exhaustion and the Application premature**

30. There were two main prayers to the instant application. There were that the DCI Lodwar Station be orders to produce a Report that was or was being prepared by the said office on the alleged issues over the suit lands which are listed in the prayers, and that the parties be at liberty to cross-examine the DCI officer or maker of the Report. The applicants contended that they had made reports to both Lodwar Police Station and the DCI office in Turkana about the alleged destruction of their fences on the suit parcels of land by the 1<sup>st</sup> Defendant, some of them recorded statements about the issue, a report was being compiled but upon asking to be supplied a copy thereof the said office declined subject to them receiving an order of the Court for that purpose. They then moved the Court as much. In the course of the hearing of the application they filed a Supplementary Affidavit to which they attached a copy of the Report referred to, dated 19/10/2022, which they stated has since been made and availed to them. They maintained that the Court should grant the orders prayed for.
31. The opposing parties argued that the application was premature, the applicants did not exhaust the internal mechanisms within the National Police Service in order to get the report availed to them and therefore, in terms of Section 8 of the *National Police Service Act* they should have sought the assistance of the Inspector General of Police to have the report given to them and therefore having failed to do so they acted against the doctrine of exhaustion of internal remedies. They argued further that the report dated 19/10/2022 was not final hence the Court could not be called upon to compel the DCI to produce it and that in any event the DCI was an independent institution which should not be directed on how to do its work including being ordered to give reports which would be contrary to the right of privacy of the parties. They argued further that the applicants were on a fishing expedition for evidence and that the Court should not descend into the arena to assist them.
32. The doctrine of exhaustion of internal remedies available to a party wherein a process is being undertaken by a body cannot be not be gainsaid. It is an important tenet and component of the Rule of Law which the 2010 Constitution has respected as a national value. Where there are internal mechanisms for resolving a dispute or issue, they ought to be completely exhausted unless the party seeking not to follow them brings himself/herself within the exceptions the law provides for. Otherwise to jump the process and invoke the court one in the adjudication of the issue would amount to premature arrival before the Court and occasion a miscarriage of justice.
33. Courts cannot countenance that practice and encourage the breaking down of the rule of law which firmly establishes constitutional democracies by permitting parties to skip the important step of exhausting local or internal remedies before stretching the hand to the seat of justice in them. It is for that purpose the Kenya enacted the *Fair Administrative Action Act*, Act No. 5 of 2015. Section 9 provides that:
- “The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this *Act* unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.”
34. Section 9(2) of the *Act* provides that where the Court is not satisfied that the remedies available under the previous Sub-Section have not been exhausted, it shall refer the issue back to that body by sending aback the Applicant to the said body. To remove oneself from the requirement to exhaust internal mechanisms one has to show that exceptional circumstances that warrant it so that the law would shield him or her from being thrown out of the seat of justice through courts.



35. Apart from providing for the office in charge of the National Police Service, I do not see how Section 8 of the [National Police Service Act](#) provides for the steps to be taken within the Kenya Police Service regarding when a report is made and not availed to a party in order for the it to be released ultimately. That does not of itself mean that there is a lack of internal mechanisms for resolving issue of failure to finalize investigations into matters presented to the Service for action and finalization within it. Be that as it may, first, I note that the Applicants, by way of their Supplementary Affidavit, admit that the report they awaited had since been availed to them. They stated that that was done on 27/10/2022, and the report was dated 19/10/2022. Therefore, whether or not the report is preliminary or not final as the opposing parties argue, the applicants have already gotten the report they wanted. That has indirectly been given to the Defendants by way of the service of the Supplementary Affidavit.
36. The above finding being so, it means to me that the applicants moved the Court prematurely for it to grant prayer 1 of the instant application while they knew well that the process of investigation was not complete and they did not have any evidence of refusal of the DCI office in releasing the report. Actually, they did not demonstrate how the report was finally released to them. That being so, I find that the prayer is overtaken by events.
37. And even if the prayer were not to have been overtaken, I doubt whether this Court had the legal backing to issue the order prayed for as I explain it here. The applicants argued that the DCI office in Lodwar had given directions or advice to the Applicants that they seek the order of the Court to compel them to provide the report sought to be brought into the record. If I understood the Applicants well, they pray that this Court orders a body which is not a party in this matter to surrender information deemed to be of evidentiary value in this matter to the parties and the court. The applicants submitted that it was discovery that they wanted the Court to assist them do.
38. While I agree with the Applicants on their reliance on the cases of [Lustman & Company](#) (*supra*) and [M. L. Sethi](#) (*supra*) in their submissions about the holdings in them regarding discovery, with due respect I do not agree that what they wanted the court to do is the process of discovery properly so called as provided for under Section 22 of the [Civil Procedure Act](#), Chapter 21 of the Laws of Kenya, Section 13(3)(b) of the [Environment and Land Court Act](#), Act No. 19 of 2011, unless they understood the term “discovery” literary. Discovery in law is as between the parties to a matter or suit and not a non-party. By the application the applicants wanted the Court to descend into the arena, assist them to gather or “collect” evidence to assist them in their case, and then purport to decide the matter. That is unacceptable under Common Law.
39. In the case of [Peter Kirika Githaiga & another v Betty Rashid](#) [2016] eKLR, regarding an appeal from a decision of refusal by the superior court to order the DCI to produce a report by the Document Examiner, the Court of Appeal aptly put it as follows:

“The appellants may as well call the Document Examiner as a witness. We think that by the appellants asking the court to compel the D.C.I to produce the report, they were asking the court to descend in the arena of conflict which the court should at all times avoid. Further, it does appear to us that by making the application, the appellants were seeking the court’s assistance in fishing for, gathering or retrieving evidence, hardly the role of the trial court in Civil Proceedings. It does not matter that the report was in possession of a third party. The fact that such a third party cannot participate in the discovery proceedings is no reason or sufficient reason for an order of review when he can easily be called as witness. Nor is it a consideration that interrogatories and discovery were inapplicable in the circumstances of the case.”



40. The same Court went on to hold that the overriding objective of the Court as provided for in the Civil Procedure Act:

“...cannot be used to fish for evidence against the adverse party. As stated in the case of Hunker Trading Co. Limited (supra), the principal purposes of the double “OO” is to enable the court to take case management principles to the centre of the court process in each case coming before it, so as to conduct the proceedings in a manner which makes the attainment of justice fair, quick and cheap.”

41. Ultimately, regarding the issue above, I find that the Applicants moved to Court in haste. They did not exhaust the internal mechanisms available for them to get the report they wanted but which they finally received. Therefore, the application was premature. In any event, even if the internal mechanisms were exhausted, the production of the document by a body or person not a party in this suit would not be by way of the process adopted by the Applicants in the instant application, hence it still would have failed.

### **c. Whether the application is merited**

42. Since, by way of admission in the deposition of the 2<sup>nd</sup> Defendant in the Supplementary Affidavit at paragraph 5 thereof, that the Applicants had received the report dated 19/10/2022 and that “it would assist the honourable court in making a decision in respect of the dispute currently pending...” it means that the only prayer outstanding is for the DCI to be ordered to produce the report in court and also to be cross-examined on it. In my understanding of the actions of the Plaintiffs, it is that they reported to the DCI Lodwar about the dispute, they recorded statements from them and made the report. As to the reasons for the involvement of the DCI in the matter while the dispute in court is a civil one, only the Plaintiffs can know. As to whether or not they were ‘building’ their evidence in the suit herein or not, it was within their mind. The DCI not being a party cannot be compelled by this Court to produce evidence on the part of any of the parties unless the said office is called as a witness in the matter. If any of the parties desire to call an officer from the said witness to give evidence in their case, it is open to them to follow the right procedure and request for issuance of witness summons to be issued to the officer. As the application before me stands now, it is merely a fishing expedition by the Applicants and the Court cannot be sucked into it. For these reasons I do not find the application merited.

### **d. Who to bear the costs of the application**

43. As at this point it is not hidden or obscure to any of the parties herein that the instant application is lost. I hereby dismiss it with costs to the Respondents who opposed it.

44. This matter shall be mentioned virtually on 22/05/2023 at 8.30 am for further directions.

45. It is so ordered.

**RULING DATED, SIGNED AND DELIVERED AT KITALE ORALLY VIA TEAMS SOFTWARE ON THIS 3RD DAY OF MAY, 2023. VIA**

**HON. DR.IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE**

